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In The Supreme Court of the United States

CARL ERIC OLSEN,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES; MICHELE LEONHART, ACTING ADMINISTRATOR OF THE UNITED STATES DRUG ENFORCEMENT ADMINISTRATION; THOMAS MILLER, ATTORNEY GENERAL OF IOWA; JOHN SARCONE, ATTORNEY OF POLK COUNTY, IOWA; AND DENNIS ANDERSON, SHERIFF OF POLK COUNTY, IOWA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

James R. Cook
Counsel of Record
JAMES R. COOK, P.C.
401 Grand Avenue
West Des Moines, IA 50265
(515) 327-9494

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
Post Office Box 7482
Charlottesville, VA 22906
(434) 978-3888

Counsel for the Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

Petitioner Carl Olsen brought this action after this Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), seeking a declaration that he is allowed, under the Religious Freedom Restoration Act (RFRA) and the United States Constitution, to use marijuana in the course of his religious worship and for appropriate injunctive relief against law enforcement officials of the United States and the State of Iowa. The courts below refused to even consider the merits of Petitioner's claims, dismissing them on the basis of collateral estoppel.

Petitioner requests review and reversal of the judgment entered in the Court of Appeals, which raise the following questions:

1) Did the lower courts err in applying collateral estoppel to the Petitioners' claims under RFRA and the Equal Protection Clause where the prior decisions relied upon for the estoppel were decided before the enactment of RFRA and applied legal principles that conflict with this Court's decision in *O Centro Espirita*?

2) Did the lower courts err in ruling that the state and federal Controlled Substances Acts (CSA) are "generally-applicable" laws for purposes of the First Amendment's Free Exercise Clause, even though those laws provide exemptions for particular religious and non-religious uses?

PARTIES TO THE PROCEEDINGS

Petitioner, who was Plaintiff-Appellant in the Court of Appeals, is Carl Eric Olsen, an adult citizen of the State of Iowa.

Respondent Michael B. Mukasey was an Appellee in the Court of Appeals below, is the Attorney General of the United States, and was substituted for Acting Attorney General Peter D. Keisler as the proper party to this action while the appeal was pending.

Karen Tandy was an Appellee in the Court of Appeals as the Administrator of the United States Drug Enforcement Agency. Respondent Michele Leonhart is the Acting Administrator of the United States Drug Enforcement Agency and is properly substituted for Karen Tandy.

Respondent Thomas Miller is the Attorney General of the State of Iowa.

Respondent John Sarcone is the Polk County (Iowa) Attorney.

Respondent Dennis Anderson is the Polk County (Iowa) Sheriff.

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CARL ERIC OLSEN, *Petitioner*,
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MICHAEL MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Carl Eric Olsen respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008), and is reprinted in the Appendix beginning at page A-1. The opinion of the United States District Court for the Southern District of Iowa is not reported and is set forth in the Appendix beginning at page A-11.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit entered its judgment and opinion on September 8, 2008. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant parts:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]

The Fifth Amendment to the United States Constitution provides, in relevant parts:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . ., nor be deprived of life, liberty, or property, without due process of law[.]

The Fourteenth Amendment to the United States Constitution, Section 1, provides, in relevant parts:

> All persons born or naturalized in the United States, subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . .; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 3 of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb-1, provides as follows:

> a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
> (1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

STATEMENT OF THE CASE

The Petitioner, Carl Eric Olsen, brought this action in the U.S. District Court for the Southern District of Iowa seeking declaratory and injunctive relief to protect the Appellant's right to possess and use cannabis as a sacrament in connection with Appellant's exercise of his religious beliefs. The District Court had jurisdiction over Olsen's claims under 28 U.S.C. §§ 1331 and 1343(a), as the claims set forth in the Complaint arise under the Constitution, laws and treaties of the United States and such claims are to secure equitable relief under Acts of Congress providing for the protection of civil rights, specifically the Religious Freedom

Restoration Act, 42 U.S.C. §§ 2000bb et seq., and 42 U.S.C. § 1983.

Olsen is a sincere adherent of the teachings of the Ethiopian Zion Coptic Church, a centuries-old church that uses cannabis, i.e., marijuana, as its sacrament (Dist. Ct. Dkt. # 1; Complaint p.9). The Complaint[1] elaborates as follows:

> 25. As a necessary and essential part of the Ethiopian Zion Coptic Church's religious practice, church members receive communion through the Sacramental use of Cannabis, which is the blood of Christ . . ., in their religious ceremonies.
>
> 26. It is a central and essential practice of the Ethiopian Zion Coptic Church that its members assemble for communion, reasoning, and worship through the Sacramental offering of Cannabis during prayer to the living god known to the church as Rastafari.

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[1] Because the District Court granted judgment in favor of the Respondents upon a Fed. R. Civ. P. 12(b)(6) motion to dismiss and the Court of Appeals affirmed that judgment, the allegations of Olsen's Complaint must be accepted as true. Indeed, it has never been asserted that Olsen's religious beliefs at issue in this case are not genuine and sincerely held.

(Dist. Ct. Dkt. # 1; Complaint p. 10). Thus, "[b]ecause the Ethiopian Zion Coptic Church considers Cannabis to be its Sacrament, a prohibition against partaking in the Sacramental use of Cannabis in the United States completely prevents [Olsen] from freely practicing his religion" (Dist. Ct. Dkt. # 1; Complaint p. 11). The cultivation of cannabis is essential to the exercise of Olsen's religion (Dist. Ct. Dkt. # 1; Complaint pp. 25, 28, 29 and 31).

The Complaint goes on to allege that "[t]he Defendants have taken the position with respect to the Ethiopian Zion Coptic Church's use of Cannabis that Cannabis is a Schedule I control substance pursuant to 21 U.S.C. § 812(c)(I)(c)(10) and 21 C.F.R. § 1308.11(d)(19) (2001), and Iowa Code § 124.204 (2006). Severe civil and criminal penalties are prescribed for, *inter alia*, the unlawful importation, possession and distribution of Cannabis" under federal and state law. "As a result of the threat of criminal prosecution, the Plaintiff has been compelled to suspend the practice of his religion in the United States." Olsen has been forced to forego the essential sacrament of his religion since the decision in *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989) became final and all avenues of direct review were exhausted (Dist. Ct. Dkt. # 1; Complaint p. 12).

In 1993, after the decision in *Olsen v. Drug Enforcement Agency*, *supra*, Congress enacted and the President signed into law the Religious Freedom

Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq. (Dist. Ct. Dkt. # 1; Complaint p. 1). On February 21, 2006, this Court issued its decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), which involved the application of the prohibitions of the Controlled Substances Act in light of RFRA (Dist. Ct. Dkt. # 1; Complaint p. 4). Olsen alleged that the decision in *O Centro Espirita* requires a court to review *de novo* the particular use of a controlled substance made by a church and determine whether such use is protected and allowed by RFRA (Dist. Ct. Dkt. # 1; Complaint pp. 5, 8). He further alleged that the application of the federal and state Controlled Substances Acts to prohibit his use of cannabis as a religious sacrament violates his right under the First Amendment to freely exercise his religion (Dist. Ct. Dkt. # 1; Complaint pp. 13-14).

Olsen contacted the Defendants and attempted to obtain an agreement that they would not seek to prosecute him for his religious use of cannabis (Dist. Ct. Dkt. # 1; Complaint p. 12). "However, Defendants, having failed and refused to guarantee they will not arrest or prosecute [Olsen] if he moves forward with the practice of his religion are effectively threatening [Olsen] with arrest and prosecution. The actions of the Defendants have a chilling and prohibitive effect on [Olsen's] exercise of his religion" and are causing Olsen to suffer psychologically and spiritually because he is alienated from his church (Dist. Ct. Dkt. # 1; Complaint p. 13).

The Complaint also alleges as follows:

> 39. Federal CSA regulations and the Iowa's CSA expressly exempt the sacramental use of peyote despite the fact that peyote is listed in Schedule I of both the Federal and State versions of the CSA. See 21 C.F.R. § 1307.31 and Iowa Code § 124.204(8) (2006). No such exemption exists for Plaintiff's Sacramental use of Cannabis.
>
> 40. The Federal CSA contains other exceptions permitting the use of controlled substances for purposes such as scientific research and medical use, and the Iowa CSA specifically exempts medical use of marijuana from the prohibitions of Schedule I of the Iowa CSA while any other use of marijuana remains prohibited. See, e.g., 21 U.S.C. § 823, 21 C.F.R. §§ 291.505, 1301.26, 1301.34, and Iowa Code § 124.204(7), 124.204(7).[2]

(Dist. Ct. Dkt. # 1; Complaint p.14). The use and possession of marijuana for medical purposes is allowed by the Defendants and has been allowed at

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[2] The second reference to Iowa Code § 124.204(7) in paragraph 40 of the Complaint is a typographical error. The correct citation is Iowa Code § 124.206(7)(a).

the Iowa State Capitol. "The fact that both [sic] Defendants allow the use and the possession of marijuana in a public place like the State Capitol Building proves beyond any reasonable doubt that the use and possession of marijuana does not cause any threat to public health and safety sufficient to substantiate a 'compelling interest' on the part of the government to restrict the Sacramental use of Cannabis by [Olsen] because a compelling interest cannot be ignored" (Dist. Ct. Dkt. # 1; Complaint pp. 14-15).

The Commission on Marijuana and Drug Abuse was specifically established by the Controlled Substances Act of 1970. The Commission found in 1972, "The total prohibition scheme was rejected primarily because no sufficiently compelling social reason, predicated on existing knowledge, justifies intrusion by the criminal justice system into the private lives of individuals who use marijuana" (Dist. Ct. Dkt. # 1; Complaint Exhibit #21).

The Chief Administrative Law Judge (ALJ) for the DEA found in 1988, "[n]early all medicines have toxic, potentially lethal effects. But marijuana is not such a substance. There is no record in the extensive medical literature describing a proven, documented cannabis-induced fatality" (Dist. Ct. Dkt. # 1; Complaint Exhibit #1, page 56). "This is a remarkable statement. First, the record on marijuana encompasses 5,000 years of human experience. Second, marijuana is now used daily by enormous numbers of people throughout the world.

Estimates suggest that from twenty million to fifty million Americans routinely, albeit illegally, smoke marijuana without the benefit of direct medical supervision. Yet, despite this long history of use and the extraordinarily high numbers of social smokers, there are simply no credible medical reports to suggest that consuming marijuana has caused a single death" (Dist. Ct. Dkt. # 1; Complaint Exhibit # 1, p. 57). "Marijuana, in its natural form, is one of the safest therapeutically active substances known to man" (Dist. Ct. Dkt. # 1; Complaint Exhibit # 1, p. 58-59).

Based on these allegations, Olsen claimed that any prohibition upon his use of cannabis for sacramental purposes violates RFRA, the Free Exercise Clause of the First Amendment (Dist. Ct. Dkt. # 1; Complaint pp. 16-17), and the guarantee to equal protection of the law provided by the Fifth and Fourteenth Amendments. Olsen requested a declaratory judgment and an injunction that would forbid the Defendants from enforcing federal and state Controlled Substances Acts against him for his "Sacramental use of Cannabis, including its possession, consumption, distribution and importation for this purpose" (Dist. Ct. Dkt. # 1; Complaint p. 32).

The federal and state Defendants filed separate motions under Fed. R. Civ. P. 12(b) seeking dismissal of all the claims. The District Court entered an Order granting the motion to dismiss under Rule 12(b)(6) for failure to state a claim. It

held that Olsen's RFRA and First Amendment claims were barred by collateral estoppel because, in cases[3] decided before this Court's ruling in *O Centro Espirita*, he had previously and unsuccessfully asserted that he had a right under the First Amendment's Free Exercise Clause to use marijuana as a sacrament in the practice of his religious beliefs (A-28, -29). It similarly held that Olsen's equal protection claims were barred by collateral estoppel (A-31). Olsen timely appealed the District Court's order dismissing his claims.

Affirming that decision and order, the Court of Appeals for the Eighth Circuit recognized that "[c]ollateral estoppel does not apply if the controlling facts or legal principles have changed significantly since Olsen's prior judgments" (A-5). However, the Court of Appeals held that this Court's decision in *O Centro Espirita* was not such a change because that decision applied RFRA and RFRA is intended to "restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)," which applied to Free Exercise Clause claims before the decision in *Employment Division v. Smith*, 494 U.S.

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[3] The cases involving Olsen's Free Exercise Clause claim are reported and include *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989) (hereafter "*DEA*"), *United States v. Rush*, 738 F.2d 497(1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985), and *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982) (hereafter "*Olsen*").

872 (1990). "The pre-*Smith* standard applicable in *Olsen*, *Rush*, and *DEA* is the same standard applicable to Olsen's current claim," the Court of Appeals held. "There is no difference in the controlling law. Olsen's federal RFRA claim is barred by collateral estoppel" (A-6).

With respect to Olsen's Free Exercise Clause claim, the Court of Appeals recognized that even after *Smith*, which held that a compelling interest is not required to uphold neutral and generally-applicable laws against claims that the laws burden the First Amendment right to exercise religion, the compelling interest test is applicable if a law is not "neutral" or "generally-applicable" (A-8). Notwithstanding Olsen's allegations that the federal and state Controlled Substances Acts are not "generally-applicable" because there are exemptions for medical uses of marijuana and the sacramental use of peyote by Native Americans, the Court ruled that "[g]eneral applicability does not mean absolute universality. Exceptions do not negate that the CSAs are generally applicable" (A-8). To the extent Olsen based his claim on the "hybrid rights" theory recognized by *Smith*, 494 U.S. at 881, the Court of Appeals held that it, like the RFRA claim, was barred by collateral estoppel (A-9).

The Court of Appeals also held that collateral estoppel barred Olsen's claim under the Fourteenth Amendment's Equal Protection Clause. Equal protection claims were raised in Olsen's prior litigation and *O Centro Espirita* did not address

equal protection issues, so did not change the controlling law (A-9).

REASONS FOR GRANTING THE WRIT

In *O Centro Espirita*, this Court established that the Religious Freedom Restoration Act of 1993 requires the government to demonstrate that it has a compelling interest to apply a prohibition on possession or use of a controlled substance to the particular religious use of the person invoking RFRA. This ruling that a "focused" compelling interest inquiry is required was a significant departure from prior decisions, which had uniformly held that the classification of a substance by Congress as subject to restriction and control was enough to demonstrate a compelling interest for refusing a religious-based exemption from the prohibitions imposed by controlled substance laws. Those prior decisions included cases involving Olsen, and the lower court seized upon those decisions as a convenient basis for dismissing his religious freedom claims.

A writ of certiorari to review and reverse the judgment dismissing Olsen's claim is required because the judgment conflicts with this Court's decision in *O Centro Espirita* and deprives Olsen of his right to be heard on his claims under federal statutory and constitutional law. The *O Centro Espirita* decision established law which wholly undermines the reasoning that led to the pre-RFRA decisions against Olsen; where the controlling legal principles have changed or been clarified, collateral

estoppel must not be used to deprive a person of his or her right to a hearing. The lower courts treated the prior decisions as if they created in the government some vested right to continue to deprive Olsen of his ability to exercise his religious beliefs, ignoring this Court's admonitions in *O Centro Espirita* that claims to religious exemptions from controlled substance laws must be adjudged on a case-by-case basis.

I. OLSEN'S RFRA CLAIM IS NOT BARRED BY COLLATERAL ESTOPPEL BECAUSE THE PRIOR DECISIONS FORMING THE BASIS FOR ESTOPPEL DID NOT APPLY THE RFRA ANALYSIS REQUIRED BY THIS COURT'S DECISION IN *O CENTRO ESPIRITA*.

Neither the District Court nor the Court of Appeals considered the merits of Olsen's claim under RFRA. Instead, the lower courts avoided confronting Olsen's claim that the state and federal governments have no compelling interest for forbidding his sacramental use of marijuana by applying collateral estoppel, relying upon decisions involving Olsen that were decided before the enactment of RFRA and before this Court's watershed decision in *O Centro Espirita*. The 2006 decision in *O Centro Espirita* is crucial because it determined that RFRA may

prevent application of the Controlled Substances Act where it would forbid use of a substance in connection with the exercise of religion. *O Centro Espirita*, 546 U.S. at 432.

The court decisions rebuffing Olsen's previous claims that his sacramental use of marijuana is protected by the First Amendment should not have barred his religious freedom claims in this action because RFRA and *O Centro Espirita* changed the controlling legal analysis. This Court has held that "it is nevertheless the general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision **or a change in the law creating an altered situation**." *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945) (emphasis added). This principle was extended to collateral estoppel in *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948), which held as follows with respect to the preclusive effect of prior judicial determinations:

> But a subsequent modification of the significant facts **or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes**. . . . [Collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided **and which have remained**

> **substantially static, factually and legally**. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

(Emphasis added). Thus, "a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable." *Id.* at 600. *Accord Restatement (Second) of Judgments* § 28(2)(d) (although an issue is actually litigated and determined by a valid and final judgment, "a new determination is warranted in order to take account of an intervening change in the applicable legal context[.]").

RFRA and the decision in *O Centro Espirita* wrought precisely the kinds of change in the legal climate that deprive the *Rush, Olsen*, and *DEA* decisions of any preclusive effect in Olsen's present action. In *O Centro Espirita*, this Court upheld the entry of a preliminary injunction in favor of individuals, allowing them to use for religious purposes a tea made from a plant that contains DMT, a CSA Schedule I controlled substance. The unanimous decision rejected the government's request that it recognize a categorical prohibition on religious use exemptions from the Controlled Substances Act, holding that this was inconsistent with the mandate of RFRA:

Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day. It is true, of course, that Schedule I substances such as DMT are exceptionally dangerous. . . . Nevertheless, there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here -- the circumscribed, sacramental use of hoasca by the UDV. The question of the harms from the sacramental use of hoasca by the UDV was litigated below. Before the District Court found that the Government had not carried its burden of showing a compelling interest in preventing such harms, the court noted that it could not "ignore that the legislative branch of the government elected to place materials containing DMT on Schedule I of the [Act], reflecting findings that substances containing DMT have 'a high potential for abuse,' and 'no currently accepted medical use in treatment in the United States,' and that 'there is a lack of accepted safety for use of [DMT] under medical supervision.'" . . . But Congress' determination that DMT should be

> listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA.

O Centro Espirita, 546 U.S. at 433 (citations omitted).

RFRA, as interpreted and applied by *O Centro Espirita*, changes the analysis of claims like Olsen's that a governmental burden on religious exercise should be removed by judicial declaration. *O Centro Espirita* recognized that RFRA was enacted to reverse the effect of the decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA was meant to reestablish that federal laws, including controlled substance regulations, that burden the free exercise of religion be supported by a compelling governmental interest. *O Centro Espirita*, 546 U.S. at 439.

More significantly, the *O Centro Espirita* case made clear that the "compelling interest" analysis required by RFRA precludes a court from relying solely upon a generalized congressional finding of a "compelling interest" to justify a burden on religious exercise resulting from a federal law. The unanimous Court ruled that a "more focused inquiry" is required by RFRA; courts must examine whether there is a compelling interest for applying the law to the RFRA claimant. In *O Centro Espirita*, this meant that "Congress' determination that DMT

should be listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA." *Id.* at 433.

This ruling wholly undermines the preclusive effect of the previous decisions involving Olsen because those decisions applied the very "categorical" approach rejected by *O Centro Espirita*. Thus, in *U.S. v. Rush*, 738 F.2d at 512, the court rejected Olsen's First Amendment defense to marijuana charges because

> [i]n enacting substantial criminal penalties for possession with intent to distribute, **Congress has weighed the evidence and reached a conclusion which it is not this court's task to review *de novo***. Every federal court that has considered the matter, so far as we are aware, has accepted the congressional determination that marijuana in fact poses a real threat to individual health and social welfare, and has upheld the criminal sanctions for possession and distribution of marijuana even where such sanctions infringe on the free exercise of religion.

(Emphasis added). The District of Columbia's decision in *DEA* was similarly predicated upon the determination of a compelling interest to regulate Schedule I substances, **not** on a determination that

there was a compelling interest as applied to Olsen and the Ethiopian Zion Coptic Church. *DEA*, 878 F.2d at 1462. And in *Olsen*, 315 N.W.2d at 8, the court relied upon a committee report submitted in connection with the enactment of the Iowa CSA which determined that marijuana posed a difficult problem in controlling drug abuse. Clearly, this is tantamount to the Congressional finding held insufficient to demonstrate a compelling interest under RFRA in *O Centro Espirita.*

Although the Court of Appeals recognized that a change in controlling legal principles can make collateral estoppel inapplicable, it found this rule was inapposite because after the enactment of RFRA and the decision in *O Centro Espirita*, "there is no difference in the controlling law." It pointed to this Court's statement in *O Centro Espirita* characterizing the compelling interest test laid down in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as "look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinizing the asserted harm of granting specific exemptions to particular religious claimants." 546 U.S. at 431. It also cited a single Eighth Circuit decision holding, in the context of a request for a driver's license, that a particularized evaluation of the claim for a religious exemption was required under pre-*Smith* Free Exercise Clause jurisprudence. *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd*, 472 U.S. 478 (1985) (A-6).

Notwithstanding the Court of Appeals' view of the law that was theoretically applicable to Olsen's previous Free Exercise Clause claims, the law that was actually applied to his claims was clearly different than the law that now controls under *O Centro Espirita.* In the first place, the case law regarding Free Exercise Clause claims for exemptions from the federal CSA **did not** involve a "particularized evaluation" of the claimed exemption. As pointed out in *Rush*, "[e]very federal court that has considered the matter, so far as we are aware, **has accepted the congressional determination that marijuana in fact poses a real threat to individual health and social welfare,** and has upheld the criminal sanctions for possession and distribution of marijuana even where such sanctions infringe on the free exercise of religion." 738 F.2d at 512 (citing *United States v. Middleton,* 690 F.2d 820, 825 (11th Cir.1982), *cert. denied,* 460 U.S. 1051 (1983); *United States v. Spears,* 443 F.2d 895 (5th Cir.1971), *cert. denied,* 404 U.S. 1020 (1972); *Leary v. United States,* 383 F.2d 851, 859-61 (5th Cir.1967), *rev'd on other grounds,* 395 U.S. 6 (1969); *Randall v. Wyrick,* 441 F.Supp. 312, 316 (W.D. Mo. 1977); *United States v. Kuch,* 288 F.Supp. 439, 448 (D.D.C. 1968)).[4] Thus, before RFRA was enacted, the law

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[4] Federal appellate courts began adopting the congressional finding to find a compelling interest for forbidding use of marijuana as a religious sacrament with *Leary*, 383 F.2d at 860. It is significant, however, that the *Leary* decision found the compelling interest analysis of *Sherbert* inapplicable

accepted the generalized finding of Congress as sufficient to establish a compelling interest for rejecting a religious-based exemption from a controlled substance prohibition.[5] *O Centro Espirita* clearly changed this law.

Even more to the point, the "compelling interest" analysis **actually** applied in Olsen's prior cases was different than the analysis required by RFRA under the *O Centro Espirita* decision. The Court of Appeals did not purport to rule that the courts in *Rush*, *DEA*, and *Olsen* made the kind of particular and individualized evaluation of Olsen's Free Exercise claims that is now required under RFRA (even as to claims for exemptions from the CSA, as *O Centro Espirita* makes abundantly clear). Instead, those prior decisions used the kind of categorical approach to controlled substances that was expressly rejected by this Court in *O Centro Espirita*.

The Eighth Circuit's decision in this case conflicts with the decision of the Ninth Circuit in *United States v. Bauer*, 84 F.3d 1549, 1557 (9th Cir.

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to cases claiming that restrictions on marijuana use violate the fundamental right to free exercise of religion.

[5] Significantly, the decision in *Smith*, 494 U.S. at 889, cited the decision in *DEA* as an example of a case where the court did not make an individualized decision on whether there was a compelling interest for denying an exemption from the federal CSA.

1996), *cert. denied*, 519 U.S. 907 (1996), which recognized that RFRA requires a different "compelling interest" analysis than had been applied in previous cases involving the federal drug laws. In *Bauer*, the court refused to follow the ruling in *Leary*, a circuit court decision that was followed in *Rush* and *Olsen*, and instead held that under RFRA, "the government had the obligation, first, to show that the application of the marijuana laws to the defendants was in furtherance of a compelling governmental interest and, second, **to show that the application of these laws to these defendants was the least restrictive means of furthering that compelling governmental interest**." *Bauer*, 84 F.3d at 1559 (emphasis added). *Bauer* confirms that the reasoning underlying *Rush* and *Olsen* has been undermined by RFRA and *O Centro Espirita*.

O Centro Espirita's explication of how the "compelling interest" test should be applied in this context is clearly a "development in the controlling legal principles" and "judicial declaration" that so changes the legal atmosphere "as to render the rule of collateral estoppel inapplicable." *Sunnen*, 333 U.S. at 599-600. The government has no vested right in the decisions in *Rush*, *DEA*, and *Olsen*, especially where it is crystal clear that the legal reasoning used in those decisions to find a compelling government interest is "obsolete [and] erroneous" in light of this Court's controlling decisions. *Id.* at 599.

The Court of Appeals' application of collateral estoppel exalts form and theory over substance and practice and, in the process, sacrifices Olsen's right to a fair determination according to the controlling law of his request to be allowed to exercise his religious beliefs. The decisions in Olsen's prior cases are plainly in conflict with this Court's decision in *O Centro Espirita.* A wooden application of the decisions in Olsen's prior cases ignores the change in the legal atmosphere and deprives Olsen of the right to have his claim of religious freedom treated equally with those of the O Centro Espírita Beneficente União do Vegetal Church and other religious adherents seeking relief under RFRA. Application of collateral estoppel here is a "foolish consistency" that creates a conflict with this Court's recent precedent. Therefore, the judgment of the Court of Appeals against Olsen must be reversed.

II. THE CSA IS NOT A GENERALLY APPLICABLE LAW AND OLSEN IS ENTITLED TO A DETERMINATION OF WHETHER THE RESTRICTION ON HIS SACRAMENTAL MARIJUANA USE IS SUPPORTED BY A COMPELLING INTEREST OR VIOLATES HIS RIGHTS UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Olsen's complaint also sought relief under the Free Exercise Clause of the First Amendment,

claiming that the CSA's restriction on his sacramental use of marijuana was an improper and unjustified burden on his ability to practice his religion. Although the decision in *Employment Div. v. Smith* holds that restrictions on the use of controlled substances for religious purposes need not be justified by a compelling state interest, *Smith* qualified the rule by holding that the prohibition must be neutral and generally applicable. *Smith*, 494 U.S. at 879. Thus, if a law is not "neutral and generally applicable," the government must demonstrate that an application which infringes upon the religious liberty of an individual is supported by a compelling governmental interest and that the law is narrowly tailored to serve that interest. *Tenafly Eruv Assn. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002), *cert. denied*, 539 U.S. 942 (2003) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 542 (1993)). "[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" *Church of the Lukumi Babalu Aye*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

Additionally, the *Smith* Court left open the viability of Free Exercise Clause attacks on laws that violate the First Amendment in conjunction with other constitutional protections. In these "hybrid rights" situations, heightened scrutiny is required. *Cornerstone Bible Church v. City of Hastings*, 948

F.2d 464, 472-73 (8th Cir. 1991) (citing *Smith*, 494 U.S. at 881-82).

1. The Controlled Substances Acts Are Not Neutral and Generally Applicable.

As pointed out in the Complaint, the federal and Iowa CSA make express exemption for certain controlled substance use, such as use of peyote for religious purposes. The federal CSA contains other exceptions permitting the use of controlled substances for purposes such as scientific research and medical use, and the Iowa CSA specifically exempts medical use of marijuana from the prohibitions of Schedule I of the Iowa CSA, while religious use of marijuana remains prohibited. *See, e.g.*, 21 U.S.C. § 823, 21 C.F.R. §§ 291.505, 1301.26, 1301.34, and Iowa Code § 124.204(7), 124.204(7). Thus, the Controlled Substances Acts do not apply across-the-board, either as to Schedule I substances generally or as to marijuana in particular. Instead, both the federal government and the State of Iowa have allowed use of Schedule I substances and marijuana under particular circumstances, including as a religious sacrament.

Even if the state and federal CSA are neutral (in the sense that they are not targeted at religious exercise), the existence of these exemptions and exceptions to the CSA's prohibitions means that the laws are not generally applicable. "The Free Exercise Clause 'protect[s] religious observers against unequal treatment,'" *Hobbie* v.

Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 148 (1987) (Stevens, J., concurring in judgment). The Constitution is offended when the government prefers certain religious denominations. *See Larson v. Valente*, 456 U.S. 228, 245 (1982) (striking down denominational preference).

The federal government and Iowa provide exemptions from the prohibition on the use of marijuana and other controlled substances for certain non-religious and religious uses. Having done so, these governments may not refuse to extend the exemption to Olsen's claim of religious hardship without compelling reason. "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884; *accord Church of the Lukumi Babalu Aye*, 508 U.S. at 537. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir.), *cert.* denied, 528 U.S. 817 (1999), the court, in an opinion authored by then circuit judge Alito, held unconstitutional a police department policy that granted exemptions from a "no beards" policy for medical reasons but refused to grant exemptions to officers whose religious beliefs required growing a beard. In holding that the policy was subject to strict scrutiny under *Smith*, the court wrote as follows:

> [T]he medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations

> for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. As discussed above, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.

Id., 170 F.3d at 366.

The Court of Appeals ruling that the CSAs are generally applicable is simply unsupported. It wrote that "[g]eneral applicability does not mean absolute universality. Exceptions do not negate that the CSAs are generally applicable," citing *O Centro Espirita*, 546 U.S. at 436, and two circuit court decisions[6] as support for its ruling (A-8, -9). Neither circuit court decision involved general applicability under the Free Exercise Clause and so are inapposite.[7] Moreover, this Court in *O Centro*

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[6] *United States v. Milk*, 281 F.3d 762, 768 (8th Cir. 2002), and *United States v. Meyers*, 95 F.3d 1475, 1481 (10th Cir. 1996), *cert. denied*, 522 U.S. 1006 (1997).

[7] The decision in *Milk* made a passing reference to the "general applicability" of the drug laws, but simply for the purpose of rejecting a defendant's claim that an exception for tribal housing should be implied into the definition of "public housing" in 21 U.S.C. § 860. In *Meyers*, the defendant never argued

Espirita, 546 U.S. at 436, stressed that because the federal government granted exemptions to some controlled substance uses, including religious uses, it could not categorically deny exemptions for other religious uses.

The grant of exemptions from the CSAs for certain religious and non-religious reasons while denying similar treatment to persons such as Olsen seeking to exercise sincerely-held religious beliefs prevents these laws from being considered "generally applicable." As a consequence, application of the laws to Olsen must be shown to be supported by a "compelling interest" and to be narrowly tailored to serve that interest. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532, 542.

2. Olsen's Claims in This Case Involve "Hybrid Rights" Requiring Strict Scrutiny.

A compelling interest inquiry also is required here because Olsen's claims involve the Free Exercise Clause, combined with other constitutional rights. In addition to the First Amendment, the Complaint sets forth infringements of Olsen's rights to equal protection of the law, *see infra*, to due process under the Fifth and Fourteenth Amendments, to assemble and worship with other

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that the CSA's prohibition on marijuana was not generally applicable, and so the court never addressed that issue.

members of his faith, his property rights under the Fourth and Fifth Amendments, and the prohibition on ex post facto applications of the law to his religion, which is centuries old and has regularly used cannabis as its sacrament. In *Cornerstone Bible Church*, 948 F.2d at 472-73, the court recognized that a "hybrid rights" free exercise claim under *Smith* is stated where the First Amendment claim is combined with, *inter alia*, equal protection claims. That is precisely the situation here. The existence of this "hybrid rights" claim triggers strict scrutiny and requires judicial examination under the approach set forth in *O Centro Espirita*.

III. COLLATERAL ESTOPPEL DOES NOT BAR OLSEN'S EQUAL PROTECTION CLAIMS BECAUSE THE RECENT DECISION IN *O CENTRO ESPIRITA* DEPRIVES ANY PREVIOUS DECISIONS OF THEIR PRECLUSIVE EFFECT.

The lower courts also relied upon collateral estoppel to dismiss Olsen's claims against the Defendants based upon the Fifth and Fourteenth Amendments' guarantees to equal protection (A-9).[8] With respect to those claims, Olsen alleged that he is similarly situated to Native American Church members in their sacramental use of a substance

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[8] The lower courts relied upon the decisions in the cases set forth in footnote 3, *supra*.

considered a Schedule I controlled substance and to UDV Church members who were claimants in the *O Centro Espirita* case. "Consequently, the Defendants' decision to allow the members of the Native American Church to use peyote and members of the UDV church to use DMT for religious purposes, while denying the same protection to Plaintiff, violates the Equal Protection rights of the Plaintiff guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution (Dkt. # 1; Complaint p. 18).

The application of collateral estoppel to these equal protection claims was error because it again fails to take into account the decision in *O Centro Espirita*. *O Centro Espirita* rejected the federal government's claim that it had demonstrated a compelling interest to require denial of the preliminary injunction. This Court stressed that the government's claim of a compelling interest was undermined by the exemption given to Native American churches for peyote. The unanimous decision concluded that there is no reasonable distinction between the sacramental use of the tea with DMT and Native American use of peyote:

> For the past 35 years, there has been a regulatory exemption for use of peyote -- a Schedule I substance -- by the Native American Church. *See* 21 C.F.R. § 1307.31 (2005). In 1994, Congress extended that exemption to all members of every recognized Indian Tribe. *See* 42

U.S.C. § 1996a(b)(1). Everything the Government says about the DMT in hoasca -- that, as a Schedule I substance, Congress has determined that it "has a high potential for abuse," "has no currently accepted medical use," and has "a lack of accepted safety for use . . . under medical supervision," 21 U.S.C. § 812(b)(1) -- applies in equal measure to the mescaline in peyote, yet both the Executive and Congress itself have decreed an exception from the Controlled Substances Act for Native American religious use of peyote. **If such use is permitted in the face of the findings in § 812(b)(1) for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs.** *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited'" (quoting *Florida Star v. B.J.F.*, 491 U.S.

> 524, 541-542 (1989) (Scalia, J., concurring in part and concurring in judgment)).
>
> The Government responds that there is a "unique relationship" between the United States and the Tribes, Brief for Petitioners 27; *see Morton v. Mancari*, 417 U.S. 535 (1974), but never explains what about that "unique" relationship justifies overriding the same findings on which the Government relies in resisting any exception for the UDV's religious use of hoasca. In other words, if any Schedule I substance is in fact always highly dangerous in any amount, no matter how used, what about the unique relationship with the Tribes justifies allowing their use of peyote? Nothing about the unique political status of the Tribes makes their members immune from the health risks the Government asserts accompany any use of a Schedule I substance, nor insulates the Schedule I substance the Tribes use in religious exercise from the alleged risk of diversion.

O Centro Espirita, 546 U.S. at 433-434 (emphasis added).

This passage establishes as a matter of law that there is really nothing to distinguish Native American church use of peyote from the sacramental use of Schedule I controlled substances by other individuals. The recent recognition of this principle wholly undermines prior decisions, including those involving Olsen, that there is some rational basis for singling out the Native American church for a Schedule I religious exemption. Indeed, because the distinction drawn here involves the fundamental right to free exercise of religion and the Native American peyote exemption exhibits discrimination between religions, the classification made here should be subjected to strict scrutiny. *Locke v. Davey*, 540 U.S. 712, 720 n.2 (2004).

The same reasoning has previously been expressed by the Department of Justice's legal counsel in a memo concerning the exemption granted the Native American Church:

> The special treatment of Indians under our law does not stem from the unique features of Indian religion or culture. With respect to these matters, Indians stand on no different footing than do other minorities in our pluralistic society. Rather, the special treatment of Indians is grounded in their unique status as political entities, formerly sovereign nations preexisting the Constitution, which still retain a measure of inherent sovereignty over

> their peoples unless divested by federal statute or by necessary implication of their dependent status. See *United States v. Wheeler*, 435 U.S. 313, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978).
>
> An exemption for Indian religious use of peyote would not be grounded in the unique political status of Indians. Instead, the exemption would be based on the special culture and religion of the Indians. In this respect, Indian religion cannot be treated differently than other religions similarly situated without violation of the Establishment Clause.

DEA, 878 F.2d at 1469 (Buckley, J., dissenting) *quoting* Memorandum Opinion for the Chief Counsel, Drug Enforcement Administration, *Peyote Exemption for Native American Church* 403, 419 (Dec. 22, 1981).

Again, the legal principles applicable to Olsen's equal protection claims have changed in the time since his prior claims were disposed of in earlier cases. This change in the law means the collateral estoppel is inapplicable and the District Court erred in dismissing Olsen's equal protection claims under that doctrine.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES R. COOK
Counsel of Record
JAME R. COOK, P.C.
401 GRAND AVENUE
WEST DES MOINES, IOWA 50265
(515) 327-9494

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
P.O. BOX 7482
CHARLOTTESVILLE, VIRGINIA 22906
(434) 978-3888

No. 08- _____

In The Supreme Court of the United States

CARL ERIC OLSEN,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES; MICHELE LEONHART, ACTING ADMINISTRATOR OF THE UNITED STATES DRUG ENFORCEMENT ADMINISTRATION; THOMAS MILLER, ATTORNEY GENERAL OF IOWA; JOHN SARCONE, ATTORNEY OF POLK COUNTY, IOWA; AND DENNIS ANDERSON, SHERIFF OF POLK COUNTY, IOWA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX

James R. Cook
Counsel of Record
JAMES R. COOK, P.C.
401 Grand Avenue
West Des Moines, IA 50265
(515) 327-9494

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
Post Office Box 7482
Charlottesville, VA 22906
(434) 978-3888

Counsel for the Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-3062

Carl Eric Olsen,	*	
	*	
Appellant,	*	
	*	
v.	*	
	*	
Michael Mukasey, Attorney General of the United States; Thomas Miller, Attorney General of Iowa; John Sarcone, Attorney of Polk County, Iowa; Dennis Anderson, Sheriff of Polk County, Iowa; Karen Tandy, Administrator of the United States Drug Enforcement Administration,	*	Appeal from the United States District Court for the Southern District of Iowa.
	*	
Appellees.	*	

Submitted: April 18, 2008
Filed: September 8, 2008

Before GRUENDER, BRIGHT, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

Carl Eric Olsen appeals the district court's[1] order dismissing his complaint for declaratory and injunctive relief from the federal and Iowa Controlled Substances Acts (CSAs) for his sacramental use of marijuana. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

Olsen asserts that he adheres to the teachings of the Ethiopian Zion Coptic Church (EZCC), which advocates the use of marijuana. In *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982), Olsen appealed from a conviction for possession of marijuana with intent to deliver. The court considered and rejected his free-exercise-of-religion defense. In *United States v. Rush*, 738 F.2d 497 (1st Cir.1984), Olsen was one of fifteen defendants convicted for taking part in an operation to distribute marijuana. Again, his free exercise defense was rejected. In *Olsen v. DEA*, 878 F.2d 1458 (D.C.Cir.1989), the court affirmed the Drug Enforcement Administration's denial of Olsen's request for a religious-use exemption from the federal laws proscribing marijuana.

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[1] The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa.

After *Olsen, Rush,* and *DEA,* the Supreme Court changed the standard of review for neutral laws of general applicability that burden religion, in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In response, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), restoring the pre- *Smith* compelling interest test in all cases where free exercise of religion is substantially burdened. **42 U.S.C. § 2000bb.**

Olsen filed this complaint in district court seeking a declaration that for his religious use, marijuana is not a controlled substance under the CSAs, and an order enjoining federal, state and local officials from enforcing the CSAs against him for the sacramental use of marijuana. The court dismissed Olsen's claims under Rule 12(b)(6) for failure to state a claim. This dismissal is a question of law subject to de novo appellate review. ***Harris v. Epoch Group***, 357 F.3d 822, 824-25 (8th Cir.2004).

II.

Olsen argues that the court erred in dismissing his statutory claims under RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

A. State RFRA Claim

Olsen contends that the court's dismissal of his RFRA claim against the state officials was improper

since RFRA should apply to the same governments as RLUIPA (which does apply to state governments). Olsen also maintains that the Iowa CSA "functions as an appendage of federal drug law" since it adopts federal designations of controlled substances and Iowa's drug law enforcement receives funding from the federal government.

Application of RFRA to the states is unconstitutional. ***City of Boerne v. Flores***, 521 U.S. 507, 511, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997); ***In re Young***, 141 F.3d 854, 856 (8th Cir.1998). The RFRA definition of "government" has been amended to no longer include state governments. **Pub.L. No. 106-274, § 7(a)(1), 114 Stat. 806 (2000) (codified at 42 U.S.C. § 2000bb-2).** The Iowa CSA is state law, not subject to RFRA.

B. Federal RFRA Claim

The district court rejected Olsen's federal RFRA claim based on collateral estoppel. Collateral estoppel or issue preclusion has five basic elements: (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior

judgment. ***Robinette v. Jones***, 476 F.3d 585, 589 (8th Cir.2007), citing ***Anderson v. Genuine Parts Co., Inc.***, 128 F.3d 1267, 1273 (8th Cir.1997).

Collateral estoppel does not apply if controlling facts or legal principles have changed significantly since Olsen's prior judgments. See ***Montana v. United States,*** 440 U.S. 147, 155, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). Collateral estoppel "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." ***Commissioner v. Sunnen***, 333 U.S. 591, 599, 68 S.Ct. 715, 92 L.Ed. 898 (1948).

According to Olsen, his claim is not barred by collateral estoppel because RFRA, as interpreted in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006), changed the method for determining whether the government has a compelling interest in prohibiting his sacramental use of marijuana. To the contrary, an explicit purpose of RFRA was to "restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened...."**42 U.S.C. § 2000bb-1**. Olsen claims *O Centro* requires that the compelling interest of a challenged law must be evaluated with respect to the particular claimant whose religious exercise is substantially burdened, *and* that this

requirement did not exist pre- *Smith*. In fact, *O Centro* says that *Sherbert* and *Yoder* "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." ***O Centro,*** 546 U.S. at 431, 126 S.Ct. 1211. The pre-*Smith* standard required a particularized evaluation. See, e.g., ***Quaring v. Peterson***, 728 F.2d 1121, 1126-27 (8th Cir.1984) (applying *Sherbert* and *Yoder* by evaluating whether a government interest in requiring driver's license photographs is compelling as applied to a particular free-exercise claimant), *aff'd by an equally divided court*, 472 U.S. 478, 105 S.Ct. 3492, 86 L.Ed.2d 383 (1985). The pre- *Smith* standard applicable in *Olsen, Rush,* and *DEA* is the same standard applicable to Olsen's current claim. There is no difference in the controlling law. Olsen's federal RFRA claim is barred by collateral estoppel.

C. RLUIPA

RLUIPA protects religious land use and the religious exercise of institutionalized persons. RLUIPA applies only to land use regulations and persons in an institution. **42 U.S.C. § 2000cc et seq.**

A "[l]and use regulation" is "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land...."**42 U.S.C. § 2000cc-5**. The CSAs are not land use regulations under RLUIPA.

Olsen also claims RLUIPA protection as a person in an institution. According to RLUIPA:

> (1) The term "institution" means any facility or institution-
>
> > (A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and
> >
> > (B) which is-
> >
> > (i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;
> >
> > (ii) a jail, prison, or other correctional facility;
> >
> > (iii) a pretrial detention facility;
> >
> > (iv) for juveniles ...
> >
> > (v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

42 U.S.C. § 1997. Olsen does not allege any facts indicating that he is an institutionalized person for purposes of RLUIPA.

III.

Olsen argues that the district court erred in dismissing his free exercise and equal protection claims. He contends that the CSAs are not neutral laws of general applicability and therefore, their application must be supported by a compelling government interest. He alternatively asserts that his claims involve "hybrid rights," requiring the compelling interest test.

Under *Smith*, if a law that is not "neutral and generally applicable" burdens a religious practice, it must be narrowly tailored to achieve a compelling government interest. ***Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah***, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). A law is not neutral if its object is "to infringe upon or restrict practices because of their religious motivation." ***Id.*** at 533. Absent evidence of an "intent to regulate religious worship," a law is a neutral law of general applicability. ***Cornerstone Bible Church v. City of Hastings,*** 948 F.2d 464, 472 (8th Cir.1991).

Olsen does not allege that the object of the CSAs is to restrict the religious use of marijuana or target the EZCC. Rather, he contends that the CSAs are not generally applicable because they exempt the use of alcohol and tobacco, certain research and medical uses of marijuana, and the sacramental use of peyote. General applicability does not mean absolute universality. Exceptions do not negate that the CSAs are generally applicable. *See* ***O Centro,*** 546 U.S. at 436; ***United States v. Milk***, 281 F.3d

762, 768 (8th Cir.2002); ***United States v. Meyers***, 95 F.3d 1475, 1481 (10th Cir.1996).

In addition to his free exercise claim, Olsen alleges an equal protection violation, invoking the *Smith* "hybrid rights" doctrine: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections...." ***Smith***, 494 U.S. at 881 Olsen contends that since he is alleging a violation of hybrid rights, the compelling interest test applies.

Olsen's free exercise claim was previously considered in *Olsen*, *Rush*, and *DEA*. Strict scrutiny was the appropriate analysis then just as it is under the "hybrid rights" doctrine. As discussed, there has not been a change in controlling law since these prior cases. Therefore, Olsen's free exercise claim-alone or hybrid-is barred by collateral estoppel.

Olsen has also already litigated his equal protection claim. *See* ***Rush***, 738 F.2d at 513; ***DEA***, 878 F.2d at 1463; ***Olsen v. State of Iowa***, 808 F.2d 652, 653 (8th Cir.1986) (per curiam). He asserts *O Centro* is an intervening change in law, but *O Centro* does not address equal protection. This court agrees with the district court that Olsen's equal protection claim is barred by collateral estoppel.

IV.

The judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CARL ERIC OLSEN,

Plaintiff, No. 4:07-cv-0023-JAJ

vs.

ALBERTO R. GONZALES, et al.,

ORDER

Defendants.

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I. INTRODUCTION

This matter comes before the court pursuant to Attorney General of Iowa Thomas Miller's February 7, 2007 Motion to Dismiss (docket 8) and Attorney of Polk County John Sarcone and Sheriff of Polk County Dennis Anderson's March 19, 2007 Joinder (docket 15) (hereinafter "State Defendants" where applicable) and Attorney General of the United States Alberto Gonzales and Administrator of the United States Drug Enforcement Administration Karen Tandy's (hereinafter "Federal Defendants") April 10, 2007 Motion to Dismiss (docket 21).

Plaintiff Carl Eric Olsen's (hereinafter "Olsen") January 16, 2007 Complaint raises the following claims against State and Federal Defendants ("Defendants" collectively): (Count I) Violation of the Religious Freedom Restoration Act (RFRA) and the

Religious Land Use and Institutionalized Persons Act (RLUIPA); (Count II) Violation of the First Amendment; (Count III) Violation of the Equal Protection Clause; (Count IV) Violation of the Ex Post Facto Clause; (Count V[2]) Improper Application of the Controlled Substances to Cannabis; (Count VI) Violation of the Fourth Amendment; (Count VII) Violation of the Fifth Amendment; (Count VIII) Violation of the Administrative Procedure Act; (Count IX) Violation of International Law and Treaties; and (Count X) Request for Declaratory Judgment. Defendant Miller filed his Motion to Dismiss on February 7, 2007 (docket 8). Olsen filed his Response on February 23, 2007 (docket 9). Defendants Sarcone and Anderson joined Defendant Miller's Motion and brief in support on March 19, 2007 (docket 15). Federal Defendants filed their Motion to Dismiss on April 10, 2007 (docket 21). Olsen filed his Response on May 2, 2007 (docket 30). Federal Defendants filed their Reply on May 25, 2007 (docket 38). Olsen filed a Motion for Leave to File Surreply and Motion For Leave to File to File Overlength Brief on June 4, 2007 (docket 40). The court denied both of Olsen's Motions regarding his proposed Surreply on June 5, 2007 (docket 41). Olsen filed a Motion for Summary Judgment on July 3, 2007 (docket 46).

Olsen asserts that the RFRA and RLUIPA amend the Federal Controlled Substances Act and the Iowa Controlled Substances Act. As such, Olsen

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[2] The court re-numbered the last five claims as Olsen labeled two claims as claim four.

urges this court to find that Defendants' interpretations of the Federal CSA and the Iowa CSA are unlawful and unconstitutional as applied to him. Specifically, Olsen seeks an order determining that "Cannabis is not a controlled substance under the Federal CSA or the Iowa CSA" and "an order enjoining Defendants from applying the Federal CSA and the Iowa CSA {to him} for his sacramental use of cannabis." For the reasons listed below, the court dismisses Olsen's claims against all Defendants.

II. CONCLUSIONS OF LAW

Defendants base their motions upon Fed. R. Civ. P. 12(b)(6) (failure to state a claim upon which relief can be granted). Federal Defendants further assert that this court should dismiss Olsen's complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The court first addresses the issue of subject matter jurisdiction. See Brotherhood of Maintenance of Way Employees Div. of Intern. Broth. Of Teamsters v. Union Pacific R. Co., 2007 WL 541826, 9 (N.D. Iowa 2007) (court notes that challenges to subject matter jurisdiction must be addressed prior to other challenges) (citations omitted).

A. Fed. R. Civ. P. 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) provides a party may move to dismiss in a pre-answer motion due to "lack of jurisdiction over the subject matter." Id. Here, Federal Defendants raise the issue "in the form of a Rule 12(b)(1) pre-answer

motion, [and] the question may be resolved either on the face of the pleadings or upon factual determinations made in consideration of matters outside of the pleadings." Id. Federal Defendants assert that Olsen has failed to demonstrate that his claims are ripe for review because he is not currently facing an impending threat of prosecution. The court addresses the issue as to all Defendants, as "subject matter jurisdiction goes to the court's power to hear the case." See Brotherhood of Maintenance Way Employees Div. of Intern. Broth. Of Teamsters v. Union Pacific R. Co., 475 F.Supp.2d 819, 831 (N.D. Iowa 2007) (court acknowledges the question of subject matter jurisdiction may be raised by any party or the court at any time).

"The ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitations and also from prudential considerations for refusing to exercise jurisdiction." Pub. Water Supply Dist. No. 10 of Cass County, Mo. v. City of Peculiar, Mo., 345 F.3d 570, 572 (8th Cir. 2003) (quoting Nebraska Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1037 (8th Cir.2000)). The test for ripeness includes two prongs: (1) whether the issue is fit for judicial decision, i.e. whether the case would benefit from further factual development, and (2) hardship to the parties, i.e. whether Olsen "has sustained or is immediately in danger of sustaining some direct injury." Pub. Water Supply Dist. No. 10, 345 F.3d at 573. Here, the issue centers upon the second prong.

A claim must be ripe in a declaratory judgment action, however such an action "can be sustained [even] *if no injury has yet occurred.*" Public Water Supply Dist. No. 8 of Clay County, Mo. v. City of Kearney, Mo., 401 F.3d 930, 932 8th Cir. 2005) (internal citations omitted). The Eighth Circuit recently stated, "Like the Fourth Circuit, we 'encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.'" St. Paul Area Chamber of Commerce v. Gaertner, 439 F.3d 481, 488 (8th Cir. 2006) (quoting Mobil Oil Corp. v. Attorney Gen., 940 F.2d 73, 75 (4th Cir.1991)) "[D]ismissal for lack of subject matter jurisdiction is appropriate only in those rare instances when the challenged claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" Id. (citing Trimble v. Asarco, Inc., 232 F.3d 946, 953 (8th Cir.2000) (quoting Bell v. Hood, 327 U.S. 678, 682-83, 66 S.Ct. 773, 90 L.Ed. 939 (1946)).

The court acknowledges that "[a] document filed pro se is 'to be liberally construed,' and 'a pro se complaint, however inartfully pleaded, must be held no less stringent standards than formal pleadings drafted by lawyers,'" Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) (internal citation omitted). Federal Rule of Civil Procedure 8(a) dictates that a plaintiff

must make a short, plain statement of the grounds for this court's subject matter jurisdiction. In the present case, Olsen states that this court has jurisdiction "under 28 U.S.C. § 1331 because the action arises under the laws and Constitution of the United States." Complaint, p. 4. Specifically, Olsen seeks a determination of his rights under the RFRA and RLUIPA, raises numerous constitutional and state law claims, and asserts rights under various international treaties. The court finds that Olsen survives the basic requirements of Rule 8(a).

B. Failure to state a Claim under Fed. R. Civ. P. 12(b)(6)

A plaintiff survives a Rule 12(b)(6) motion by adequately stating a claim[3]; to do so, the plaintiff must provide "more than labels and conclusions, and

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[3] The Supreme Court recently clarified the applicable standard under Rule 12(b)(6) in Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007). Previously, a court would not dismiss a complaint pursuant to Rule 12(b)(6) according to "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 46 (1957). The Bell Atlantic Court rejected Conley's "no set of facts" standard and instead determined that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Bell Atlantic, 127 S.Ct. at 1969. The Supreme Court clarified Conley to stand for the "breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." Bell Atlantic, 127 S.Ct. at 1969.

a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1965 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level,"Id. (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 234-236 (3d ed.2004). When analyzing the adequacy of a complaint's allegations under Rule 12(b)(6), the court must accept as true all of the complaint's factual allegations and view them in the light most favorable to the plaintiff. Id.; see Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1 (2002); Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) ("when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint")(citations omitted).) "The issue is not whether plaintiffs will ultimately prevail, but rather whether they are entitled to offer evidence in support of their claims." U.S. v. Aceto Agr. Chemicals Corp., 872 F.2d 1373, 1376 (8th Cir. 1989) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984)). As noted previously, the court views pro se complaints more liberally, however a pro se plaintiff must still provided more than conclusory allegations. Harris v. Gadd, 2007 WL 1106114, 1 (E.D. Ark. 2007) (citations omitted).

1. Statutory Claims

Olsen states that the RFRA and RLUIPA were passed by Congress "to prevent the government from burdening the free exercise of religion unless it had a compelling government interest in doing so and it

accomplished its goal by the least restrictive means." As such, Olsen asserts that Defendants have violated his statutory rights under both statutes because,

> (44) Defendants' interpretations of the Federal and Iowa versions of the CSA substantially burden the Plaintiff's Exercise of his Religion and use of his land.
>
> (45) Defendants' criminalization of Plaintiff's Sacramental use of Cannabis serves no compelling government interest.
>
> (46) Even assuming that Defendants' interpretations of the Federal and Iowa versions of the CSA did serve a compelling interest, a complete ban on the Sacramental use of Cannabis by the Plaintiff on his own land is not the least restrictive means of furthering any such interest.

Complaint, p. 16.

Defendant Miller asserts that "neither the RFRA nor the RLUIPA apply under the facts of this case, and, even if they did apply, they would not, as a matter of law, affect the validity of any prohibition of the use, possession or sale of marijuana since such statutory prohibitions are the least restrictive means of addressing a compelling state interest."

a. Count I: RFRA

State Defendants assert that Olsen's RFRA claim fails "because the United States Supreme

Court has explicitly held that application of this statute to the states is unconstitutional." City of Boerne v. Flores, 521 U.S. 507 (1997). The court agrees and dismisses this Count as to the State Defendants.

Congress enacted the RFRA in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990) in order to restore the "compelling interest" test previously established in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972).[4]

> The RFRA provides that
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

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[4] The Senate Judiciary Committee noted that
The Religious Freedom Restoration Act of 1993 is intended to restore the compelling interest test previously applicable to free exercise cases by requiring that government actions that substantially burden the exercise of religion be demonstrated to be the least restrictive means of furthering a compelling governmental interest. The committee expects that the courts will look to free exercise cases decided prior to Smith for guidance in determining whether the exercise of religion has been substantially burdened and the [] least restrictive means have been employed in furthering a compelling governmental interest.
S. Rep. No. 103-111 at 8-9 (1993) as reprinted in 1993 U.S.C.C.A.N. 1892, 1898.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1)is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C.A. § 2000bb-1

Olsen argues that the Supreme Court's decision in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S. Ct. 1211 (2006) supports his bringing of the instant action. The O Centro court affirmed the granting of a preliminary injunction under the RFRA where it determined that "the Government failed to demonstrate... a compelling interest in barring the [plaintiff]'s sacramental use of hoasca." O Centro, 126 S.Ct. at 1225. This court finds Olsen's reasoning unpersuasive. In the initial decision granting the preliminary injunction at issue in O Centro, the district court distinguished its treatment of hoasca from cases involving marijuana.

> There is a second major distinction between the present case and the cases involving claims that the principles of religious freedom reflected in the Free Exercise Clause and RFRA should be interpreted as permitting the sacramental use of marijuana. This distinction stems from the significant differences in the characteristics of the drugs at issue. Affirming a trial court's denial of a criminal defendants' request to rely in *1254 RFRA as a defense to marijuana charges, the Eighth Circuit stated "that the government has a compelling state interest in controlling the use of marijuana." United States v. Brown, 72 F.3d 134 (8th Cir.1995) (table). As support for this

> observation, the Brown court cited a number of First Amendment opinions which had emphasized problems associated with the marijuana in particular. See, e.g., United States v. Greene, 892 F.2d 453, 456-57 (6th Cir.1989) ("Every federal court that has considered this issue has accepted Congress' determination that marijuana poses a real threat to individual health and social welfare and had upheld criminal penalties for possession and distribution even where such penalties may infringe to some extent on the free exercise of religion."); United States v. Middleton, 690 F.2d 820, 825 (11th Cir.1982), quoting Leary v. United States, 383 F.2d 851, 860-61 (5th Cir.1967) ("It would be difficult to imagine the harm which would result if the criminal statutes against marijuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes.")

O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F.Supp.2d 1236, 1253-1254 (D.N.M. 2002)

Further, the government has previously met the "compelling interest" test in lawsuits brought by Olsen on the same issue. See United States v. Rush,

738 F.2d 497 (C.A. Me. 984); Olsen v. Drug Enforcement Admin., 878 F.2d 1458 (C.A.D.C. 1989). In fact, Olsen's previous unsuccessful lawsuit in United States v. Rush, 738 F.2d 497 (C.A. Me. 984) has been cited as a reason for dismissing "claims which, while constituting a RFRA prima facie case, had already been ruled invalid." O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 342 F.3d 1170, 1179 (10th Cir. 2003) (court notes that "a plaintiff seeking to use marijuana for religious purposes would likely not be able demonstrate a substantial likelihood of success on the merits because courts have already ruled against sacramental marijuana claims")(citing Rush, 738 F.2d at 512, for the conclusion that "the Government has a compelling interest in banning the possession and distribution of marijuana notwithstanding the burden on religious practice").

Federal Defendants thus properly assert that collateral estoppel, or "issue preclusion," blocks Olsen's claim. In the Eighth Circuit, issue preclusion has five elements:

> (1)the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been litigated in the prior action; (4) the issue sought to be precluded must have been determined

> by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment.

Robinette v. Jones, 476 F.3d 585, 589 (8th Cir. 2007) (citing Anderson v. Genuine Parts Co,, Inc., 128 F.3d 1267, 1273 (8th Cir. 1997).

The court in Rush analyzed the government's interest in controlling marijuana use and distribution as follows:

> Much evidence has been adduced from which it might rationally be inferred that marijuana constitutes a health hazard and a threat to social welfare; on the other hand, proponents of free marijuana use have attempted to demonstrate that it is quite harmless. See Randall v. Wyrick, 441 F.Supp. 312, 315-16 (W.D.Mo.1977); United States v. Kuch, 288 F.Supp. 439, 446 & 448 (D.D.C.1968). In enacting substantial criminal penalties for possession with intent to distribute, Congress has weighed the evidence and reached a conclusion which it is not this court's task to review de novo. Every federal court that has considered the matter, so far as we are aware, has accepted the congressional determination that marijuana in fact poses a real threat to individual

> health and social welfare, and has upheld the criminal sanctions for possession and distribution of marijuana even where such sanctions infringe on the free exercise of religion. United States v. Middleton, 690 F.2d 820, 825 (11th Cir. 1982), cert. denied, 460 U.S. 1051, 103 S.Ct. 1497, 75 L.Ed.2d 929 (1983); United States v. Spears, 443 F.2d 895 (5th Cir. 1971), cert. denied, 404 U.S. 1020, 92 S.Ct. 693, 30 L.Ed.2d 669 (1972); Leary v. United States, 383 F.2d 851, 859-61 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); Randall, 441 F.Supp. at 316 & n. 2; Kuch, 288 F.Supp. at 448. Only last year, the Eleventh Circuit rejected identical claims raised by some of the very appellants before us in this case, see Middleton, 690 F.2d 820, and the United States Supreme Court denied review. We decline to second-guess the unanimous *513 precedent establishing an overriding governmental interest in regulating marijuana.

United States v. Rush, 738 F.2d 497, 512-513 (C.A. Me. 984).

In Olsen, Olsen conceded that the government had a "compelling interest in controlling the distribution and drug-related use of marijuana" and instead challenged the government's means. See Olsen, 878 F.2d at 1462. The court upheld the government's means as follows,

> The pivotal issue, therefore, is whether marijuana usage by Olsen and other members of his church can be accommodated without undue interference with the government's interest in controlling the drug. Three circuits have so far considered pleas for religious exemption from the marijuana laws; each has rejected the argument that accommodation to sacramental use of the drug is feasible and therefore required. Rush, 738 F.2d at 513 (First Circuit); Olsen v. Iowa, 808 F.2d at 653 (Eighth Circuit); Middleton, 690 F.2d at 825 (Eleventh Circuit). We have no reason to doubt that these courts have accurately gauged the Highest Court's pathmarks in this area.

Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1462 (C.A.D.C. 1989).

The court finds that Olsen was a party in the above-mentioned lawsuits in which the current issue was involved, actually litigated, determined by a

valid, final judgment, and the current claims were essential to the prior judgment. As such, this Court agrees that collateral estoppel applies to Olsen's claim under RFRA and dismisses Count I as to the Federal Defendants as well.

b. Count I: RLUIPA

Olsen seeks a determination of his rights under the RLUIPA, which protects "Religious Exercise in Land Use and by Institutional Persons," as interpreted by the Supreme Court in Cutter v. Wilkinson, 544 U.S. 709, 715, 125 (2005). In Cutter, the Supreme Court's analyzed Section 3 of the RLUIPA, which provides, in part, that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution." Id. 42 U.S.C.A. § 2000cc. Defendants argue that Olsen may not bring a claim under this statute as he is not incarcerated, and the CSA does not affect Olsen's religious use of land. The court agrees and dismisses Olsen's claims brought under the RLUIPA as to all Defendants.

2. Constitutional Claims

Olsen alleges violations regarding his First Amendment free exercise rights, Equal Protection, the Ex Post Facto Clause, the Fourth Amendment, and the Fifth Amendment.

a. Count II: First Amendment

Olsen asserts that the Defendants' interpretation of the statutory and regulatory scheme of the Federal Controlled Substances Act has violated

his rights under the Free Exercise Clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." US CONST AMEND I.

State Defendants note that Olsen's free exercise claims "have already been found to have no merit by both the Eighth Circuit Court of Appeals and by the Iowa Supreme Court." Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986); State v. Olsen, 315 N.W.2d 1 (Iowa 1982).

Federal Defendants assert that Olsen's claim alternatively fails as a matter of law because the CSA is a neutral law of general applicability, and thus may burden Olsen's "religiously motivated conduct without compelling justification," citing Employment Div. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 883 (1990); United States v. Meyers, 95 F.3d 1475, 1481 (10th Cir. 1996); O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1246 (D.N.M. 2002).

As noted previously in the section regarding Olsen's RFRA claim in Count 1, the court finds that Olsen is collaterally estopped from bringing the same claim in this court. See Olsen, 878 F.2d at 1461. (court notes that "Olsen free exercise claim has been raised, considered, and rejected in the context of criminal proceedings" city Olsen v. Iowa, 808 F.2d at 653; Rush, 738 F.2d at 512-13; Middleton, 690 F.2d

at 824-26; State v. Olsen, 315 N.W.2d at 7-9; Town v. State ex rel. Reno, 377 So.2d at 650-51). The Court dismisses Count II as to all Defendants.

b. Count III: Equal Protection Clause

Olsen raises his equal protection clause as follows

> 57.The Plaintiff is similarly situated to Native American Church members in their sacramental use of a substance considered a Schedule I controlled substance under the Federal and Iowa versions of the CSA. Nevertheless, Defendants have refused to accord the same deference to the Plaintiff.
> 58. The Plaintiff is similarly situated to UDV Church members in their sacramental use of a substance considered a Schedule I controlled substance under the Federal and Iowa versions of the CSA. Nevertheless, Defendants have refused to accord the same deference to the Plaintiff.
> 59. Consequently, the Defendants' decision to allow the members of the Native American Church to use peyote and members of the UDV church to use DMT for religious purposes, while denying the same protection to the Plaintiff, violates the Equal Protection rights of the Plaintiff guaranteed by

> the Fifth and Fourteenth Amendments to the United States.

Complaint, pp. 17-18.

As noted for Counts I and II, Olsen previously brought this identical claim and is collaterally estopped from re-litigating the same claim. See Olsen, 878 F.2d at 1463. (court notes that "Olsen has urged before that members of his church are similarly situated to the beneficiaries of the exemption prescribed in 21 C.F.R. § 1307.31. See Olsen v. Iowa, 808 F.2d at 653; Rush, 738 F.2d at 513. We join our sister courts in rejecting this plea."). The court grants dismisses Count III as to all Defendants.

c. Count IV: Ex Post Facto Clause

Olsen improperly invokes the Ex Post Facto Clause, which provides that "No Bill of Attainder or ex post facto Law shall be passed." U.S.C.A. Const. Art. I § 9, cl. 3. Olsen states that, "Based upon the erroneous and unlawful determination that Cannabis is a controlled substance under the CSA, Defendants have criminally prosecuted the Plaintiff in the past... and have threatened to criminally prosecute the Plaintiff [in the future]."

> Our test for determining whether a criminal law is *ex post facto* derives from these principles. As was stated in Weaver, to fall within the ex post facto prohibition, two critical elements must

> be present: first, the law "must be retrospective, that is, it must apply to events occurring before its enactment"; and second, "it must disadvantage the offender affected by it."

Miller v. Florida, 482 U.S. 423, 340 (1987)(emphasis in original) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)). Defendants argue that this clause does not apply to Olsen's claims. This court agrees; Olsen fails to establish the first element as the CSA was not applied to him retrospectively. The court dismisses Count IV as to all Defendants.

d. Count VI: Fourth Amendment

Olsen claims that "Defendant cannot substantially burden his right to be secure in his person, house, papers, and effects, without demonstration of the facts of a threat to public health and safety which triggers the application of the Compelling Interest Test to review the facts and application of the law de novo." Complaint p. 21.

The Fourth Amendment protects

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

> describing the place to be searched, and the persons or things to be seized.

U.S.C.A. Const. Amend. IV.

State Defendants note as follows,

> The nature of this allegation is unclear. Apart from general rubric about what the Fourth Amendment protects, little is said to support such a claim. There is no allegation that Olsen was ever the victim, or will ever be the victim, of an illegal search and/or seizure. There is certainly no allegation that any particular defendant ever participated in, or caused, such an event.

Federal Defendants also argue that Olsen fails to raise a viable claim and cannot save his claim by comparing it to the "hybrid" situation presented in Employment Division v. Smith, 494 U.S. at 881-882. Federal Defendants point out that "the hybrid situation mentioned in Smith referred only to a few prior cases were religiously motivated action that also implicated freedom of speech rights or rights of parents to raise their children."

The court agrees that Olsen fails to state a claim for which relief can be granted and dismisses Count VI as to all Defendants.

e. Count VII: Fifth Amendment

Olsen claims Defendants violated his rights under the Fifth Amendment due to their failure to provide him with a pre-deprivation notice and hearing prior to seizing his property, i.e. his marijuana, in the past. Defendants state that Olsen's claim is frivolous as he cannot claim a constitutionally protected property interest in marijuana. This court agrees and dismisses Count VII as to all Defendants.

3. Other Claims

a. Count V: Iowa Controlled Substances Act

Olsen asserts that Defendants have criminally prosecuted him in the past and have threatened to criminally prosecute him in the future due to the "erroneous and unlawful determination that Cannabis is a controlled substance under the CSA."

Defendants assert that this court lacks jurisdiction to remove marijuana from the CSA and that the "CSA provides "an administrative remedy for any interested party to request that a substance be deleted entirely from the CSA or be transferred to a less restrictive schedule." citing 21 U.S.C. § 811(a). This court agrees and dismisses Count V as to all Defendants.

b. Count VIII: Administrative Procedure Act

Olsen claims that

> The Federal Defendants' conduct as set forth above constitutes agency action that is: (a) arbitrary and capricious; (b) an abuse of discretion and otherwise not in accordance with6 the law: © contrary to the Plaintiff's constitutional and statutory rights; (d) in excess of statutory jurisdiction and authority; and (e) without observance of procedures required by law. Such action should be set aside and declaratory and injunctive relief provided under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

Complaint, p. 22.

Federal Defendants argue that "plaintiff merely cross-references his previous allegation...[and thus] this count is completely derivative of plaintiff's other claims." Fed. Def. Brief, p. 30. Olsen agrees, stating that he "feels that he has exhausted reasonable attempts to obtain relief under the APA." Response, p. 28. The court dismisses this count as to all Defendants.

c. Count IX: Treaties and Conventions

Olsen contends that his religious use of cannabis is protected under the United Nations International Covenant on Civil and Political Rights ("ICCPR"), 138 Cong. Rec. S4781-84 (1992), the Universal Declaration of Human Rights ("UDHR"), GA res. 217A, Dec. 10, 1948, the International

Religious Freedom Act ("IRFA"), Pub. L. No. 105-292, 112 Stat. 2787 (1998) (codified at 22 U.S.C. §§ 6401-6481), and the 1971 Convention on Psychotropic Substances ("CPS"), 32 U.S.T. 543, 1019 U.N.T.S. 175.

State Defendants not that: (1) Plaintiff cites to documents that refer to the United States government, rather than the states; (2) Plaintiff lacks standing to raise any claim as an individual; (3) Under O Centro, international treaties and conventions may "not be read as negating an umambiguous statute such as the Controlled Substances Act"; and (4) None of the international treaties/conventions "specifically prohibits the criminalization of marijuana."

Federal Defendants note that: (1) The ICCPR is not self-executing and thus the Plaintiff has no privately enforceable rights absent implementing legislation by Congress, citing U.S. ex rel. Perez v. Warden, FMC Rochester, 286 F.3d 1059, 1063 (8th Cir. 2002) Payne-Barahona v. Gonzales, 474 F.3d 1, 3 (1st Cir. 2007); Martinez-Lopez v. Gonzales, 454 F.3d 500, 502 (5th Cir. 2006); Guaylupo-Moya v. Gonzales, 423 F.3d 121, 133 (2nd Cir. 2005); (2) The UDHR is not an enforceable source of law in federal courts, citing Guaylupo-Moya, 423 F.3d at 133; (3) The CPS is also not self-executing and thus creates no private cause of action for the Plaintiff absent implementing legislation. Similarly, the CPS also does not create a private right of action. citing Hernandez v. Ciba-Geigy Corp. USA, 200 F.R.D. 285, 294 (S.D. Tex.

2001); and (4) The IFRA applies only internationally and the statute specifically precludes judicial review. 22 U.S.C. § 6450. The court agrees and dismisses Count IX as to all Defendants.

d. Count X: Request for Declaratory Judgment

As noted previously, the court dismisses all claims brought by Olsen against all Defendants, thus Olsen's request for declaratory judgment is denied.

III. CONCLUSION

Upon the foregoing,

IT IS ORDERED that State Defendant Miller's February 7, 2007 Motion to Dismiss (docket 8), State Defendants Sarcone and Anderson's March 19, 2007 Joinder (docket 15), and Federal Defendants April 10, 2007 Motion to Dismiss (docket 21) are GRANTED. Olsen's July 2, 2007 Motion for Summary Judgment is DENIED as moot. (docket 43). The clerk shall enter judgment for all Defendants on all claims.

DATED this 16th day of July, 2007.

JOHN A. JARVEY
UNITED STATES
DISTRICT JUDGE
SOUTHERN DISTRICT
OF IOWA

No. 08-777

In the Supreme Court of the United States

CARL ERIC OLSEN, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
MICHAEL F. HERTZ
Acting Assistant Attorney General
MARK B. STERN
MELISSA N. PATTERSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in relying on principles of issue preclusion in rejecting petitioner's claims under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb-1 *et seq.* and the Equal Protection Clause of the United States Constitution.

2. Whether the court of appeals correctly rejected petitioner's contention that the Free Exercise Clause of the United States Constitution entitles him to a religious use exemption from various federal and state laws that regulate the manufacture, distribution, and use of marijuana.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 541 F.3d 827. The opinion of the district court (Pet. App. A11-A37) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2008. The petition for a writ of certiorari was filed on December 8, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the early 1980's, petitioner was convicted in Iowa state court of possessing marijuana with the intent to deliver it. Pet. App. A2; *State* v. *Olsen*, 315 N.W.2d 1 (Iowa 1982) (*Olsen I*). The Supreme Court of Iowa re-

versed and remanded for a new trial after the State conceded that the trial court erred in admitting certain expert testimony. *Id.* at 3. Because it determined that certain issues would "doubtless recur on retrial," the court proceeded to address those issues as well. *Id.* at 2. In particular, the court specifically rejected petitioner's claim that "the State's prohibition against the possession of marijuana unconstitutionally infringes upon his use of the drug for religious purposes." *Id.* at 7; see *id.* at 8-9. Citing *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), see *Olsen I*, 315 N.W.2d at 8, the Iowa court held that "[a] compelling state interest sufficient to override [petitioner's] free exercise clause argument is demonstrated in this case," *id.* at 9; see *id.* at 8-9.

On remand, petitioner was convicted a second time and the Supreme Court of Iowa affirmed in an unreported opinion. See *Olsen* v. *State*, Civ. No. 83-301-E, 1986 WL 4045, at *3-*4 (S.D. Iowa Mar. 19, 1986) (*Olsen II*) (reprinting the Supreme Court of Iowa's unreported opinion). The Supreme Court of Iowa stated that it saw "no reason to retreat from" its previous rejection of petitioner's free exercise claim. *Id.* at *4. The Iowa court also specifically rejected an "equal protection challenge, based on the legislative exemption granted the peyote ceremonies of the Native American Church." *Ibid.*

Petitioner filed a petition for a writ of habeas corpus in federal district court, which the court summarily dismissed. *Olsen* v. *Iowa*, 649 F. Supp. 14 (S.D. Iowa) (*Olsen III*), aff'd, 808 F.2d 652 (8th Cir. 1986) (per curiam). The court of appeals affirmed the dismissal of petitioner's petition for a writ of habeas corpus in a brief per curiam opinion. *Olsen* v. *Iowa*, 808 F.2d 652 (8th Cir. 1986) (*Olsen IV*) (per curiam).

b. Around the same time, petitioner was also convicted in federal district court of possessing marijuana with the intent to distribute it. Pet. App. A2; *United States* v. *Rush*, 738 F.2d 497, 500, 502 n.7 (1984), cert. denied, 470 U.S. 1004 (1985). In affirming that conviction, the First Circuit specifically rejected petitioner's contention that the prosecution violated his rights under the Free Exercise Clause of the United States Constitution. *Id.* at 511-513. The court of appeals also specifically rejected petitioner's argument that he was "entitled as a matter of equal protection to a religious exemption from the marijuana laws on the same terms as the peyote exception granted the Native American Church." *Id.* at 513.

c. In 1986, petitioner filed a petition for judicial review of the Drug Enforcement Agency's denial of his request for a religious use exemption from the federal laws that prohibit the possession and distribution of marijuana. Pet. App. A2; *Olsen* v. *DEA*, 878 F.2d 1458, 1459 (1989), cert. denied, 495 U.S. 906 (1990). In an opinion by then-Judge Ginsburg, the D.C. Circuit rejected petitioner's claims that the denial of such an exemption violated his rights under the Free Exercise Clause of the United States Constitution. *Id.* at 1461-1462. The court of appeals determined that the government has a "compelling interest in controlling the distribution and drug-related use of marijuana," and it described "[t]he pivotal issue" before it as "whether marijuana usage by [petitioner] and other members of his church can be accommodated without undue interference with the government's interest." *Id.* at 1462. The court answered that specific question "no." *Ibid.* It explained that, "[b]ecause the tenets of [petitioner's] church endorse marijuana use every day throughout the

day," any "proposal for confined use would not be self-enforcing" and it was "hardly unreasonable to forecast a large monitoring burden." *Ibid.* The court also noted that those concerns had specific evidentiary support: It observed that, "in years past, the church's '[c]hecks on distribution of cannabis to nonbelievers in the faith [were] minimal,' there was 'easy access to cannabis for a child who had absolutely no interest in learning the religion,' and '[m]embers [partook] of cannabis anywhere, not just within the confines of a church facility." *Ibid.* (brackets in original) (quoting *Town* v. *State*, 377 So. 2d 648, 649, 651 (Fla. 1979), cert. denied, 449 U.S. 803 (1980)). *DEA* also specifically rejected petitioner's contention that the denial of a religious use exemption to him with respect to marijuana "on the same terms as * * * granted the Native American Church" with respect to peyote violated his rights under the Equal Protection Clause of the United States Constitution. *Id.* at 1463; see *id.* at 1463-1465.

2. In 1993, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (42 U.S.C. 2000bb-1 *et seq.*). As described by Congress, the purpose of RFRA was "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963)[,] and Wisconsin v. Yoder, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1).[1]

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[1] In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), this Court held that RFRA could not constitutionally be applied to state governments. RFRA continues to be applicable to the federal government. See *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423-424 & n.1 (2006).

3. The current litigation began in 2007, when petitioner filed suit in the United States District Court for the Southern District of Iowa. Petitioner sought a declaratory judgment that his religious use of marijuana would not violate the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, or comparable state laws, and an injunction barring federal, state, and local officials from enforcing those laws against him. As relevant here, petitioner raised claims under RFRA, as well as the Free Exercise and Equal Protection Clauses of the United States Constitution (U.S. Const. Amends. I, XIV). Pet. App. A19-A31.

The district court granted respondents' motions to dismiss petitioner's complaint in an unpublished opinion. Pet. App. A11-A37. The court concluded that principles of issue preclusion required rejection of petitioner's RFRA claim against the federal defendants, as well as his claims under the Free Exercise and Equal Protection Clauses of the United States Constitution. *Id.* at A19-A31.

4. The court of appeals affirmed. Pet. App. A1-A10. With respect to petitioner's RFRA claim, the court acknowledged that "[c]ollateral estoppel does not apply if controlling facts or legal principles have changed significantly since [petitioner's] prior judgments." *Id.* at A5. But it rejected petitioner's contention that this Court's decision in *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 428-429 (2006) (*O Centro*), "changed the method for determining whether the government has a compelling interest in prohibiting his sacramental use of marijuana." Pet. App. A5. The court of appeals stated that, "[t]o the contrary, an explicit purpose of RFRA was to 'restore the compelling interest test as set forth in *Sherbert* * * * and * * * *Yoder*,

* * * and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Ibid.* (quoting 42 U.S.C. 2000bb(b)(1)). The court rejected petitioner's assertion that *O Centro* established any additional requirements that "did not exist pre-*Smith*," noting that *O Centro* "says that *Sherbert* and *Yoder* 'looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.' " *Id.* at A6 (quoting *O Centro*, 546 U.S. at 431). The court of appeals thus concluded that "[t]he pre-*Smith* standard applicable in [*Olsen I*], *Rush*, and *DEA* is the same standard applicable to [petitioner's] current claim," and that petitioner's RFRA claim was thus "barred by collateral estoppel." *Ibid.*

The court of appeals also rejected petitioner's claims under the Free Exercise Clause. Pet. App. A8-A9. The court noted that petitioner did not allege that the object of the CSA was "to restrict the religious use of marijuana or target" adherents of his particular faith. *Id.* at A8. The court also concluded that the federal and state drug laws that petitioner was challenging were laws of general applicability notwithstanding the fact that "they exempt the use of alcohol and tobacco, certain research and medical uses of marijuana, and the sacramental use of peyote." *Ibid.* The court explained that "[g]eneral applicability does not mean absolute universality" and that "[e]xceptions do not negate that [such laws] are generally applicable." *Ibid.* The court also observed that petitioner's "free exercise claim was previously considered in *Olsen [I]*, *Rush*, and *DEA*," and stated that it was "barred by collateral estoppel." *Id.* at A9.

Finally, the court of appeals rejected both a "hybrid rights" claim and petitioner's freestanding equal protection claim. Pet. App. A9. The court reiterated that petitioner's free exercise claim had been previously considered and previously rejected, and it stated that any such claim "alone or hybrid—is barred by collateral estoppel." *Ibid.* The court of appeals also stated that petitioner "ha[d] also already litigated his equal protection claim," and it concluded that *O Centro* did not represent "an intervening change in law" with respect to that claim, because "*O Centro* does not address equal protection." *Ibid.* Accordingly, the court of appeals held that petitioner's equal protection claim was also "barred by collateral estoppel." *Ibid.*

ARGUMENT

Petitioner asserts that the court of appeals erred in relying on principles of issue preclusion in rejecting his RFRA (Pet. 14-24) and equal protection (Pet. 30-35) claims. Petitioner also renews (Pet. 24-30) his claims that the federal and state drug laws that he challenges in this litigation are neither neutral nor generally applicable, as well as his assertion that, even if those laws are neutral and generally applicable, the court of appeals should have applied strict scrutiny because this case involves "hybrid rights." The court of appeals' decision is correct and does not conflict with any decision of this Court or with the decisions of another court of appeals. Further review is not warranted.

1. The doctrines of claim preclusion and issue preclusion "preclude parties from contesting matters that they have had a full and fair opportunity to litigate." *Montana* v. *United States*, 440 U.S. 147, 153 (1979). "Issue preclusion * * * bars 'successive litigation of an

issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2171 (2008) (quoting *New Hampshire* v. *Maine*, 532 U.S. 742, 748-749 (2001)); see Restatement (Second) of Judgments § 27 (1982) (Restatement).

a. Petitioner contends (Pet. 14-24) that the court of appeals erred in relying on principles of issue preclusion in rejecting his RFRA claim. That argument does not merit further review.

The court of appeals correctly rejected petitioner's RFRA claim. The controlling questions under RFRA are whether there is "a compelling government interest" in controlling the distribution and use of marijuana and whether failing to grant petitioner a religious use exemption "is the least restrictive means of furthering that compelling government interest." 42 U.S.C. 2000bb-1(b). As the court of appeals correctly explained (Pet. App. A6), three previous decisions to which petitioner was a party—*Olsen I*, *Rush*, and *DEA*—all considered those very questions and resolved them against petitioner. See *DEA*, 878 F.2d 1461-1463; *Rush*, 738 F.2d 511-513; *Olsen I*, 315 N.W.2d at 8-9; see also pp. 2-4, *supra*.

Petitioner asserts that issue preclusion does not apply here because this Court's 2006 decision in *O Centro* "changed the controlling legal analysis" under the compelling interest test. Pet. 15; see Restatement § 28(2)(b) (stating that issue preclusion is not warranted where there has been "an intervening change in the applicable legal context"). As the court of appeals correctly explained (Pet. App. A6), that is incorrect. In *O Centro*, this Court acknowledged that "RFRA expressly adopted

the compelling interest test '*as set forth in Sherbert* v. *Verner*, 374 U.S. 398 (1963)[,] and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).'" 546 U.S. at 431 (emphasis added) (quoting 42 U.S.C. 2000bb(b)(1)). In addition, as the court of appeals also observed (Pet. App. A6), *O Centro* expressly relied on the fact that *Sherbert* and *Yoder* had themselves "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." 546 U.S. at 431. *O Centro* thus makes clear that the Court was engaged in the application, rather than the alteration, of the same legal standard that it had applied under the Free Exercise Clause before its decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990); accord S. Rep. No. 111, 103d Cong., 1st Sess. 9 (1993) (stating that, under RFRA, "the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*").

Petitioner also asserts (Pet. 22) that issue preclusion is not appropriate here because "the 'compelling interest' analysis *actually* applied in [petitioner's] prior cases was different than the analysis required by RFRA under the *O Centro Espirita* decision." Specifically, petitioner contends (*ibid.*) that the previous decisions failed to make "the kind of particular and individualized evaluation of [his] Free Exercise claims" that *O Centro* makes clear was required under the *Sherbert/Yoder* standard and instead "used the kind of categorical approach to controlled substances that was expressly rejected by this Court in *O Centro*."

That claim fails for two independent reasons. First, the D.C. Circuit's decision in *DEA* makes clear that that court engaged in precisely the sort of particularized

analysis described in *O Centro*. The *DEA* court did not take a "categorical approach to controlled substances." Pet. 22. Instead, it analyzed both petitioner's request for "a broad religious exception" and his plea for a more particularized "time- and place-specific use" exemption that he had proposed during the course of that litigation. *DEA*, 878 F.2d at 1462. Nor did the D.C. Circuit's decision in *DEA* rely on the need for "the *uniform* application of the Controlled Substances Act" as a basis for rejecting petitioner's request for a particularized exemption. *O Centro*, 546 U.S. at 423. Instead, the Court examined both the tenets and the past practices of petitioner and his particular religious community in reaching its conclusion that the granting of any such exemption to petitioner would unduly burden the enforcement of the federal laws regarding marijuana. See *DEA*, 878 F.2d at 1462; pp. 3-4, *supra*; see also *O Centro*, 546 U.S. at 435 (stating that, under the *Sherbert/Yoder* standard, "the Government can demonstrate a compelling interest in uniform application * * * by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program").[2]

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[2] Petitioner errs in asserting (Pet. 22 n.5) that this Court's decision in *Smith* "cited the [D.C. Circuit's] decision in *DEA* as an example of a case where the court did not make an individualized decision on whether there was a compelling interest for denying an exemption from the federal CSA." The Court's passing citation of *DEA* in *Smith* was made in the context of noting that the constitutional rule favored by the respondents in that case "would *open the prospect of* constitutionally required religious exemptions from civic obligations of almost every conceivable kind," including exemptions from "drug laws." *Smith*, 494 U.S. at 888-889 (emphasis added).

Second, even assuming *arguendo* that petitioner has made a prima facie case that one or more of the previous decisions misapplied the controlling legal analysis in rejecting his free exercise claims, that fact would not by itself warrant refusing to grant those decisions preclusive effect in this case. The overriding purposes of preclusion doctrines are to avoid "the expense and vexation attending multiple lawsuits, [to] conserv[e] judicial resources, and [to] foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-154. Preclusion doctrines cannot serve that purpose if a losing party may avoid their application simply by arguing that one or more of three previous decisions to which he was a party was incorrectly decided.

Petitioner's assertion (Pet. 22-23) that the court of appeals' rejection of his RFRA claim conflicts with *United States* v. *Bauer*, 84 F.3d 1549 (9th Cir.), cert. denied, 519 U.S. 907 (1996), 519 U.S. 1131, and 519 U.S. 1132 (1997), is without merit. *Bauer* was a direct appeal from a federal criminal conviction. It did not involve the preclusive force that should be accorded to any previous decision, much less the continuing preclusive force of *Olsen I*, *Rush*, and *DEA* post-RFRA. Nor did the Ninth Circuit's brief analysis in *Bauer* suggest that any previous decision—much less the specific decisions at issue in this case—had been incorrectly decided. Instead, *Bauer* stated that the district court in that case had erred in "treat[ing] the existence of the marijuana laws as *dispositive* of the question whether the government had chosen the least restrictive means of preventing the sale and distribution of marijuana," and it remanded for further proceedings. *Id.* at 1559 (emphasis added). As explained previously, the *DEA* court did not take the cate-

gorical approach that the Ninth Circuit rejected in *Bauer*. In addition, the *Bauer* court expressly did "not exclude the possibility that," even under RFRA, "the government may show that the least restrictive means of preventing the sale and distribution of marijuana is the universal enforcement of the marijuana laws." *Ibid.*

b. Petitioner's assertion (Pet. 30-35) that the court of appeals erred in relying on issue preclusion in rejecting his equal protection claim is likewise without merit. As the court of appeals correctly explained (Pet. App. A9), petitioner "has also already litigated his equal protection claim" in *Olsen II*, *Rush*, and *DEA*. See *DEA*, 878 F.2d at 1463; *Rush*, 738 F.2d at 513; *Olsen II*, 1986 WL 4045, at *4.

Petitioner does not assert that the court of appeals' decision with respect to this point conflicts with the decisions of another court of appeals. In addition, although petitioner asserts (Pet. 31) that the court of appeals "fail[ed] to take into account the decision in *O Centro*," the court of appeals correctly explained (Pet. App. A9) that *O Centro* "does not address equal protection."

2. Petitioner also renews (Pet. 24-30) his constitutional claims under the Free Exercise Clause. Petitioner does not assert that the court of appeals' rejection of these claims conflicts with the decisions of any other court of appeals.

Petitioner's free exercise claim also fails on the merits. Although petitioner contends that the CSA is not a neutral law of general applicability, Pet. 26-29, he does not and cannot contend that the "*object* of [the CSA] is to infringe upon or restrict practices because of their religious motivation," which is the governing standard for measuring a law's neutrality. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533

(1993) (emphasis added). In addition, the court of appeals correctly explained that "[g]eneral applicability does not mean absolute universality" and that the existence of certain exemptions with respect to use of other substances or for other purposes "do[es] not negate" the fact that the federal drug laws are "generally applicable." Pet. App. A8.

Finally, even if petitioner were able to establish that the CSA is not a neutral law of general applicability, or that his claim is otherwise subject to strict scrutiny because it involves hybrid rights, that claim would still fail. *Olsen I*, *Rush*, and *DEA* all held that the refusal to grant petitioner a religious use exemption satisfies strict scrutiny. As a result, the court of appeals correctly held that petitioner's "free exercise claim—alone or hybrid —is barred by collateral estoppel" as well. Pet. App. A9. Further review is thus unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
MICHAEL F. HERTZ
Acting Assistant Attorney General
MARK B. STERN
MELISSA N. PATTERSON
Attorneys

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No. 08-777

In The Supreme Court of the United States

CARL ERIC OLSEN,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

James R. Cook
Counsel of Record
JAMES R. COOK, P.C.
401 Grand Avenue
West Des Moines, IA 50265
(515) 327-9494
Participating Attorney on Behalf of The Rutherford Institute

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Counsel for the Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

REPLY TO BRIEF IN OPPOSITION

1. The federal respondents argue that application of collateral estoppel to Petitioner Olsen's Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq., claim was proper because Olsen was previously given the kind of scrutiny mandated by RFRA under this Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Citing the decision in *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989) (hereafter "*DEA*"), they contend that Olsen's Free Exercise Clause claim was examined under the "focused inquiry" required by *O Centro Espirita*, 546 U.S. at 433, by the Court of Appeals for the District of Columbia in 1989 (Br. in Opp. at 10). Significantly, the federal Respondents apparently concede that the other cases[1] relied upon by the courts below for applying collateral estoppel employed the "categorical" compelling interest analysis (which accepts a Congressional finding of a compelling interest as dispositive) rejected by this Court in *O Centro Espirita*.

However, the contention that the "focused inquiry" was employed by the *DEA* court is belied by the very text of the *DEA* decision. Thus, the *DEA* court, in addressing the pivotal issue on Olsen's Free Exercise Clause claim cited *Rush* and *Olsen* and wrote that "[t]hree circuits have so far considered pleas for religious exemption from the marijuana

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[1] *United States v. Rush*, 738 F.2d 497(1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985) (hereafter "*Rush*"), and *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982) (hereafter "*Olsen*").

laws; each has rejected the argument that accommodation to sacramental use of the drug is feasible and therefore required. . . . We have no reason to doubt that these courts have accurately gauged the Highest Court's pathmarks in this area." *DEA*, 878 F.2d at 1462.[2] If there is any doubt that the *DEA* court was simply adopting the "categorical" approach applied in *Rush* and *Olsen*, it is dispelled by that court's comment that "Olsen's free exercise claim has been raised, considered, and rejected in the context of criminal proceedings. . . . We agree, substantially, with those dispositions, and therefore need not treat the issue expansively." *DEA*, 878 F.2d at 1461. The *DEA* court's cursory examination of the compelling interest issue and reliance on the rulings of cases that clearly applied the "categorical" approach this Court rejected in *O Centro Espirita* demonstrates that it did not apply the "focused" inquiry mandated by RFRA.

The *DEA* court's discussion of the accommodation proposed by Olsen in that case also fails to show that the rigorous and focused

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[2] The *DEA* decision also cited *United States v. Middleton*, 690 F.2d 825 (11th Cir.1982), *cert. denied*, 460 U.S. 1051 (1983), which used the "categorical approach" in rejecting a Free Exercise Clause challenge to the prohibition on marijuana use. "Congress has strongly and clearly expressed its intent to protect the public from the obvious danger of drugs and drug traffic. *See* 21 U.S.C. § 801(2) (1976). Unquestionably, Congress can constitutionally control the use of drugs that it determines to be dangerous, even if those drugs are to be used for religious purposes." *Middleton*, 690 F.2d at 825.

examination mandated by *O Centro Espirita* was employed by the *DEA* court. Under RFRA, as interpreted by *O Centro Espirita*, 546 U.S. at 428 and 433, it is the government which must shoulder the burden of proving that it has a compelling interest for the application of the law against an individual. *See also* 42 U.S.C. § 2000bb-2(3) (for purposes of RFRA, the term "demonstrates" means that it meets the burdens of going forward with the evidence and of persuasion). There is no indication in either the *DEA* decision or the underlying administrative decision under review that the government was put to the burden of offering evidence that it had a compelling interest in applying the prohibition on marijuana to Olsen and his religious practices.

Contrary to the federal Respondents' arguments, Olsen is not arguing that collateral estoppel should be avoided here because the prior cases were wrongly decided (although Olsen does not concede that the prior cases correctly resolved the constitutional claims he made in those cases). The point is that the controlling legal principles, as established by the intervening enactment of RFRA and the decision in *O Centro Espirita*, have changed or been clarified. Those legal principles differ in a crucial and significant way from those applied in the previous cases where Olsen's Free Exercise Clause claims were at issue. The interest in finality which the federal Respondents advocate must yield where the principles defining the rights at issue have become obsolete and erroneous. *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948).

2. With respect to Olsen's Free Exercise Clause claim, the federal Respondents resort to parroting the decision below, asserting that a law is "generally applicable" for purposes of *Employment Division v. Smith*, 494 U.S. 872 (1990), even if the prohibition the law establishes has exceptions. As with the Court of Appeals' decision, the federal Respondents cite no case law to support this position (Br. in Opp. at 13). As pointed out in Olsen's petition, the requirement of general applicability is not satisfied if the law provides for exemptions to a prohibition but does not allow for exemptions on the basis of religious beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 537 (1993).

Any claim that the federal marijuana prohibition is generally applicable must be deemed without credibility in light of recent declarations by Respondent Holder, the Attorney General of the United States, that the federal government will no longer pursue prosecution against purveyors of marijuana in those states that have legalized the use of marijuana for medical purposes. *See* http://www.washingtonpost.com/wp-dyn/content/article/2009/04/10/AR2009041001288.html (Attorney General Holder announced that the federal government would no longer go after groups that supply medical marijuana in the thirteen states where it is legal) and "Holder's pot policy unclear on old state cases," available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/10/MN5816UOLA.DTL (Attorney General Holder announced that

federal agents will target only persons who violate both federal and state law; anyone complying with the medical marijuana law in the 13 other states with such laws would be left alone). If the federal government believes there should be an exemption for the use of marijuana for purported medical reasons, the Free Exercise Clause forbids denying a similar exemption for Olsen's use of marijuana as part of his religious beliefs unless the government demonstrates a compelling interest for denying Olsen that exemption.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, the writ should be granted.

Respectfully submitted,

JAMES R. COOK
Counsel of Record
JAMES R. COOK, P.C.
401 GRAND AVENUE
WEST DES MOINES,
IOWA 50265
(515) 327-9494
PARTICIPATING ATTORNEY ON BEHALF OF THE RUTHERFORD INSTITUTE

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
1440 SACHEM PLACE
CHARLOTTESVILLE, VA 22901
(434) 978-3888